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PROPERTY LAW: 1992-1993

VOLUME TWO: LIMITED INTERESTS IN LAND
AND LANDLORD AND TENANT LAW

J. Phillips
Faculty of Law
University of Toronto

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CHAPTER EIGHT: NATURAL RIGHTS(A) GENERAL

INTRODUCTORY NOTE: Natural rights are best seen as the rights (generally of use and exploitation but including rights of support) which accompany the fee simple. The remedy for a breach of natural rights is an action in nuisance - the action taken when there is an interference with the reasonable use and enjoyment of land. You should remember that much from the Victoria Park case in volume one. From this you can also assume that natural rights problems invariably involve situations in which one landowner uses her land in such a way as to injure the land of another.

The extract from Sinclair's book gives you a general introduction to the kinds of things that are considered part of "natural rights". This material will not be on the exam, but a general understanding of it will help you to understand the area. You should particularly pay attention to the final section, dealing with rights of support, for they will help with part (b) of this chapter and with easements.

(B) THE REASONABLE EXERCISE OF RIGHTS: PROPERTY AND TORT REGIMES

NOTE: The following two cases present radically different approaches to the issue of competing interests of landowners. The greatest contrast is obviously between the ways in which the Ontario and English Courts of Appeal conceptualise, and therefore decide, the issue, but there is also a contrast to be drawn between the approaches taken by the Ontario court and the Supreme Court of Canada. In addition, the Pugliese decision at the Ontario Court of Appeal level offers an excellent review of the variety of approaches taken in other common law jurisdictions.

Both of these cases involve a landowner exercising a natural right - the right to extract percolating water from beneath the land. In both cases subsidence damage was caused to other land as a result. The common law viewed the extracting landowner's right as absolute in this situation; there was no requirement to consider the possible harm to others - that is, no duty of care. In reading them, consider why I call this a "property regime", and why it might be said that the Ontario court opts for an alternative, "tort regime". Is there a possible middle ground between these? Do these cases assist in understanding the fundamental differences between "property" and "tort"? If so, what importance can we attach to the process of initially categorising a legal problem?

PUGLIESE et al. v. NATIONAL CAPITAL COMMISSION et al.; BEAVER
UNDERGROUND STRUCTURES LTD. et al., Third Parties
DUNN et al. v. REGIONAL MUNICIPALITY OF OTTAWA-CARLETON et al.

(1977), 79 D.L.R. (3d) 592 (Ont. C.A.)

The judgment of the Court was delivered by

HOWLAND, J.A.:—The 171 plaintiffs in the Pugliese action, who are the owners of 101 residential properties in the Township of Nepean in the Regional Municipality of Ottawa-Carleton, and the four plaintiffs in the Dunn action, who are the owners of two residential properties in the same part of the municipality, claim that the ground water table below their properties was substantially lowered by the construction of a collector sewer on lands of the National Capital Commission located nearby, and that their homes and lands were seriously damaged by the resulting subsidence. There is also a claim that properties involved both in the Pugliese action and in the Dunn action were damaged as a result of drilling and blasting operations.

• • • •

In Stinson v. Lenehan (1989), 101 N.B.R. (2d) 238 (Q.B.) the plaintiff complained that the defendant, his neighbour across the street, had unreasonably caused the water level in his, the plaintiff's, well, to drop substantially with the result that supply was intermittent and major changes had to be made to the well. While there was no doubt that the defendant had caused the problem by operating a water-to-air heat exchange on domestic well water, the court dismissed the suit. It noted that, unlike the Pugliese case, there was no statutory limit to how much water a landowner could extract. Stevenson J. refused to decide whether the defendant had been unreasonable, although he did state that "the introduction of new methods of heating and air conditioning, and perhaps other devices in the home that require large volumes of water for their operation, place a heavy demand on limited resources. It may be necessary to determine what are reasonable standards with respect to the quantity of water a landowner may use."

CHAPTER NINE - EASEMENTS

A) INTRODUCTORY NOTE

An easement is one of the class of rights in land known as incorporeal hereditaments. It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration.

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods - assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple - as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is made, only that the agreement has.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in section (c) of this chapter), and if the right granted meets the necessary test for being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract. But if it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

For the reasons which we have stated, Danckwerts J. came, in our judgment, to a right conclusion in this case and, accordingly, the appeal must be dismissed.

NOTE ON POSITIVE AND NEGATIVE EASEMENTS: A great number of rights have been recognised by the courts as valid easements. A selection includes the right to tunnel under land, to maintain power lines and towers, to discharge water onto somebody else's land, to have drainage pipes and sewers underground, to string a clothes line, to use a church pew, and, my personal favourite, to use a neighbour's washroom. The list of possible easements is by no means closed, despite some judicial pronouncements hinting at that in the early part of this century.

However, it should be noted that the numerous examples given here are all of what are termed "positive easements". They involve A's right to do something on B's land. But there are also a few negative easements recognised - easements which give A the right to prevent B doing something with his or her land. Those known to the law are: the right to light, the right to air by a defined channel, the right to lateral support for buildings, and the right to continue to receive the flow of water from an artificial stream. Note that the latter two are rights similar to natural rights but excluded from that category.

Phipps v. Pears involves a claim for a negative easement. Do not concern yourself at this stage with how any easement might have been created. Consider the arguments for and against permitting this and other negative easements. What values animate the judiciary in this instance?

C) CREATION BY EXPRESS OR IMPLIED GRANT

INTRODUCTORY NOTE: The common law maintains that all easements are created by grant. Here I am using the word grant as a noun; that is, all easements are created in a document incorporating the agreement between the parties. The grant of the easement may be separate from the grant of an estate or joined with it. Obviously there was a grant in the Ellenborough Park case, the issue there being whether what was granted was capable of forming the subject matter of an easement.

However, the rule that easements are created in a grant is in fact a fiction, and there are three ways to create an easement: express grants, implied grants, and presumed grants. Express grants are easy to understand; there was one in Ellenborough Park. Implied grants represent situations in which the law implies into a land transaction which is silent on the subject an agreement to also create an easement. Presumed grants, dealt with in section (d) below, involve easements established by long use.

The following note from Mendes da Costa and Balfour and the three cases which succeed it deal with implied grants. First, however, we must add a further explanation, of the difference between grants (using that word as a verb - you will remember a previous discussion of the two meanings given to the word grant) and reservations. Consider again the example used in the introductory note of a person's wish to sell off part of a piece of land surrounded on three sides by woods and on one side by a road. The land will be divided into two with one part "landlocked". If the seller parts with the landlocked part and gives the buyer an easement, he or she grants (verb) both an estate and an easement in the grant (noun). This is called an express grant of an easement. However, if the seller wants to keep the landlocked part and to sell off the part that fronts the road, and in doing so makes an agreement that he or she can have access to the road over the buyer's land, he or she has reserved the easement in the grant (noun). The seller has kept something back. This is called an express reservation of an easement, although note that it is still being created in a grant (noun).

There will obviously be no problem in arguing that an easement has been created, whether by express grant or express reservation, if the words in the grant are clear. If the words are less than clear, however, the deed will be construed in favour of the grantee (this is a general rule). Thus in a doubtful case it will be much easier to argue for the existence of an express grant than for an express reservation.

We will not do anything more on express grants and reservations. When reading the rest of the material in the section make sure you understand the different rules relating to when implied grants and implied reservations will be found by the courts, and why they are different. The Mendes da Costa and Balfour extract lays out the general rules, and Sandom and Wong deal respectively with implied reservations and implied grants. Floyd v. Heska examines the interaction between easement law and the Conveyancing and Law of Property Act.

D. Mendes da Costa and R.J. Balfour, Property Law: Cases, Texts and Materials (Toronto, 1982)

Easements Arising by Implication

NOTE ON BASIC PRINCIPLES: *WHEELDON v. BURROWS*

The situation in which easements are most commonly created by implication occurs when there is a severance of a possessory interest in land into two or more interests. This can happen, for example, when the owner of two lots sells one of them, when a homeowner leases one floor of his house to a tenant, or when a testator provides by will for the division of his real property for two or more devisees. In such cases, easements appurtenant to any of the several parts of the land may of course be created expressly. But if they are not, when do easements arise by implication?

The leading case on many aspects of the question, regularly quoted and followed by English and Canadian courts, is *Wheeldon v. Burrows* (1879) 12 Ch.D. 31 (CA); it is the best introduction to the modern law.

In *Wheeldon*, Tetley owned a piece of vacant land and an adjoining industrial property on which had been built a factory and several workshops. In January 1876, he conveyed one lot of the vacant land to the plaintiff's husband and shortly thereafter sold the industrial land to the defendant. Although the deed to the plaintiff's husband had not expressly reserved any right over the land for the benefit of Tetley's other property, the defendant claimed, as Tetley's successor, an implied easement of light which prevented the plaintiff (who succeeded to her husband's property at his death) from constructing

D) CREATION BY PRESUMED GRANT

INTRODUCTORY NOTE: This section examines the third of the three ways by which easements can be created - by "presumed" grant. This is also known as creating easements by prescription. Although the crucial factor is long use, the fiction of creation by the parties is retained in English law through the notion that the grant of an easement either preceded "legal memory" or was made in modern times (post-1189) but had been lost. The extract from Mendes da Costa and Balfour below discusses prescription at common law and through the doctrine of lost modern grant, but we will only concern ourselves with prescription under the Limitations Act.

Read the section on the Act carefully, concentrating on the test that a claimant of an easement by prescription is required to meet. Note that generally the same kinds of easements that can be obtained in express or implied grants can also be obtained in presumed grants; that is, in all cases the claimant must merely meet the Ellenborough Park test. However, there are a few exceptions - see sections 33 and 35 of the Act. These are all easements that can be obtained by the other two methods but not by prescription.

D. Mendes da Costa and R.J. Balfour, Property Law: Cases, Texts and Materials (Toronto, 1982)

Easements Acquired by Prescription

ONTARIO LAW REFORM COMMISSION

Report on Limitation of Actions

(1969), pp. 143-48

Easements are regarded as always being created by a grant. The grant, however, may be express, implied or presumed.

An easement under a presumed grant is one which is established under the doctrine of prescription. The law will presume a grant of an easement where there has been long undisturbed enjoyment by the person claiming the easement....

For a prescriptive easement to arise, the claimant must show user "as of right". This means that he has enjoyed the easement as if he were entitled to it. The enjoyment must have been without force, without secrecy and without permission. (*Nec vi, nec clam, nec precario* are the expressions used in legal terminology.) A claimant to a right of way will not succeed if he had to break open a locked gate to achieve his use or where the adverse use has been continually contentious. Nor will he be successful if the adverse use is secret, although active concealment is not an essential ingredient of secrecy for this purpose. This may be illustrated by the underground discharge of waste from one property into another. Finally, if permission has been given by the owner of the land, a prescriptive easement cannot arise. It matters not how long ago that permission was given, or whether it was written or oral. Obviously, if an owner

NOTE: Merely establishing that the right has been exercised for the correct period of time is not enough to make out a claim for a prescriptive easement. The common law rules on the nature and quality of use also have to be adhered to. These were developed in the context of lost modern grant claims, but have always been used for statutory prescription also. It might be useful to think of these as laying down requirements for the quality of use of an alleged easement in the same way that the courts developed rules for the quality of possession in adverse possession law.

The principal rule is that the claimant of the easement has to have exercised "user as of right". He or she has to have exercised the alleged right in such a way that they can be seen as having said: "Of course I have a right to do this". This primary rule is said to consist of three sub-rules, summarised in the Latin maxim nec clam, nec vi, nec precario - no secrecy, no violence, no permission. Garfinkel v. Kleinberg discusses this. As you read it think especially about the difference between acquiescence by the servient tenement owner and permission from that person.

GARFINKEL v. KLEINBERG, [1955] 2 D.L.R. 844 (Ont. C.A.)

The judgment of the Court was delivered by

F. G. MacKAY J.A.:—This is an appeal by the defendants from the judgment of His Honour Judge Lovering of the County Court of the County of York, dated January 26, 1954.

The plaintiff is the owner of the premises known as 120 Markham St. in the City of Toronto and the defendants are the owners of the premises immediately adjoining on the south, known as 118 Markham St. There is a party-wall between the two houses. The plaintiff's claim is that he has acquired a prescriptive right to use a chimney in the wall of the defendants' house. This chimney is entirely on the property of the defendants and is located at a point close to where the walls of the two houses join to become a party-wall. The defendants plead that if the plaintiff used the chimney he did so secretly and without their knowledge, and they plead the provisions of the *Registry Act*, R.S.O. 1950, c. 336.

At the trial the defendants attempted to prove that the use of the chimney by the plaintiff first commenced in the year 1949. The learned trial Judge rejected this defence. He also found against the defendants on the other defences pleaded and held that the plaintiff was entitled to a declaration that he had acquired a prescriptive right to the use of the chimney, and granted an injunction restraining the defendants from interfering with such use. I am of the opinion that the learned trial Judge was right.

The evidence relating to the ownership and occupancy of the two properties is as follows: The plaintiff purchased the property known as 120 Markham St. from Gustave and Oscar S. Kling by deed dated July 31, 1911, and registered on January 10, 1912. The vendors also owned the property immediately adjoining on the south and in their deed to the plaintiff they

E) NOTE ON THE SCOPE OF EASEMENTS AND TERMINATION

An easement granted for one purpose cannot be used for another. A good example of this principle is found in Malden Farms Ltd. v. Nicholson (1956), 3 D.L.R. (2d) 236 (Ont. C.A.). In 1916 the owner of the servient tenement granted the owner of the dominant tenement (which was farmland) a right of way across his land for persons, animals and vehicles. In the early 1950's the successor in title to the dominant tenement began to develop the land as a beach resort, and the right of way was used by increasingly large numbers of vehicles. The Court of Appeal sustained an injunction granted to the successor in title to the original owner of the servient tenement. Aylesworth J.A. noted that the applicable principles were to be found in Gale on Easements:

According to the present state of the authorities, it appears that the grantee of a right of way is not entitled to increase the legitimate burden. But, on the other hand, the legal extent of his right may entitle him to increase the amount of inconveniences imposed upon the servient tenement -- e.g., by placing on the dominant tenement new buildings or increasing the size of old buildings. And the legal extent of the right (in other words, the mode as distinct from the extent of user) must, it seems, be ascertained from the intention of the parties at the time when the right was created.

He then held that "the burden of the easement has been markedly increased.... [It] is now burdened, not with a private right of way in favour of appellant, his heirs and assigns, as originally contemplated, but with a use of the way for appellant's commercial purposes by great numbers of the public who travel over respondent's lands much as though the same constituted a public highway or a busy toll-road." Thus the appellant's use of the right of way was an "unauthorized enlargement and alteration in the character, nature and extent of the easement."

See also Re Gordon et al and Regan et al (1985), 15 D.L.R. (4th) 651 (Ont. H.C.). The parties were each entitled to a right of way over a mutual private drive to reach their respective properties. In 1922 the predecessors in title to one of the parties had bought some adjoining land and built a garage on it and then used the drive to reach that land also, which practice was continued by the party in this action. But he now wanted to convert the house into two semi-detached houses and to allow the purchasers of the second house to use the right of way to get to the adjoining land and garage. Griffiths J. held first that a right of way remains attached to each part of a dominant tenement if it is sub-divided and that, absent any specific restrictions in the grant, a reasonable increase in use is permissible. But he then held that the proposed use was improper because a right of way appurtenant to one property cannot be used colourably to reach a different, adjoining property.

There are three ways to extinguish an easement.

First, by statutory provisions allowing an application to the court for an order terminating the easement. While these are common with respect to restrictive covenants (see Chapter Ten below), most jurisdictions do not have such legislation for easements.

Second, an easement is terminated by operation of law if the purpose for which it is granted comes to an end, or if the right is abused (as in the Malden Farms case noted above), or if it was granted with a time limit and the time expires, or if the owner of the dominant and servient tenement becomes the same person. Note, however, with respect to this last point that if the same person comes into possession of the two tenements under different estates, the easement will merely be suspended.

Third, an easement can be terminated by release, express or implied. The burden of proof is very high on the owner of a servient tenement who wants to argue implied release; merely showing that the use was stopped for some period of time will not suffice.

CHAPTER TEN: RESTRICTIVE COVENANTS

A) INTRODUCTORY NOTE

Restrictive covenants are another form of incorporeal hereditament, like easements. Begin with the notion that a covenant is an agreement under seal, one contained in a deed. In the context of real property law, it is an agreement by which one person agrees to do something, or not to do something, with his or her land, for the benefit of the other party. As with an easement created by express grant, we can use contract law to say that the terms of the covenant are enforceable as between the original parties. But, again similarly to an easement, the issue is when the terms of the covenant become attached to the land, as part of title to it, and are therefore enforceable by and against successors in title to the original contracting parties.

A paradigm restrictive covenant (that's a term of art which will be explained later) would be a limit on the kind of development that one land owner could undertake. That is, you own land and sell half of it off. You know the purchaser is a yuppie stockbroker who would want to build a large, ugly house and paint it pink. You insert a clause in the conveyance that would prevent this. Restrictive covenants are therefore a form of private zoning.

At this stage we need to introduce two terms. The covenantor, the person who agrees to do something or not to do something, has what is called the burden of the covenant. The covenantee, the person for whose benefit the covenant is made, has what is called the benefit of the covenant. Enforcing the burden and being able to enforce the benefit against or for a successor in title to the original party is known as running the burden or the benefit.

An obvious question which will occur to you at this point is - what is the difference between covenants and easements? I am not going to answer this fully at the moment, because the entire answer requires us to understand the whole chapter. But for now think of a covenant

(a) as containing terms and conditions that would not amount to an easement by the characteristics outlined in Ellenborough Park or because of the restrictions on negative easements noted in Phipps v. Pears, and

(b) as harder to enforce as part of title than an easement is. You would not, therefore, try to enforce a right of way as a covenant.

Let us now return to the situation with which we began - two persons make a covenant related to land which is enforceable between the original parties. When will it be enforceable for and against successors-in-title? This question brings a rather complicated answer. The first part of the answer involves making a distinction between the benefit and the burden and between common law and equity.

B) COVENANTS GENERALLY: RUNNING THE BENEFIT AT COMMON LAW

NOTE: The common law will not allow the burden to be run at all, but will allow the benefit to run in certain circumstances. In other words successors in title could enforce a covenant against the original covenantor, but not against his or her successors. The two principal conditions to be met before the common law will even allow the benefit to run are that:

1) The covenant is annexed or assigned to the land, intended to run with the land. Forget this for now, we do it later in the chapter.

2) It meets certain other conditions, the most important of which is that the covenant "must touch and concern the land". This is what the Austerberry case is about.

C) RESTRICTIVE COVENANTS

NOTE: It was stated above that the common law rule is that the burden of a covenant will not run. But equity will run the burden in certain circumstances. This is where the term of art "restrictive covenants" comes in. A restrictive covenant can be defined as a covenant that equity will enforce against successors in title to the original covenantor.

The covenant must meet certain conditions before its burden will run in equity. There are five requirements. One of them is that the covenant is annexed or assigned to the land, intended to run with the land. This is the same requirement as for running the benefit of positive covenants at common law, and is discussed below. Another is that the covenant must be negative in substance. The other three are progressively detailed in the following three cases.

Tulk v. Moxhay and LCC v. Allen are the two leading cases which collectively lay out the basic principles of when equity will enforce a restrictive covenant. Consider what the basis of the decision is in Tulk, the case which is said to have established the principle that equity will allow the burden to run. Then ask yourselves if, according to Tulk, the burden should have run in LCC v. Allen? Since it did not, you should then consider what additional requirements Allen seems to add before the burden will be run. Galbraith v. Madawaska discusses an additional requirement.

D) ANNEXATION AND ASSIGNMENT

NOTE: For any covenant to run with the land it must be intended to do so. This means that the benefit must either be annexed to the land, or assigned. The latter means that the benefit of the covenant is expressly included in subsequent transactions. Annexation means that the covenant is part of the title to land by the intention of the original contracting parties. If the court considers it to be so then there is no need to say anything in future deeds when the land is sold in order to pass the benefit of the covenant. To successfully argue for annexation one has to show clear language in the deed. The Sekretov case discusses whether that includes a need to clearly indicate the land being benefitted, or whether one can use surrounding circumstances to decide that issue.

RE SEKRETOV AND CITY OF TORONTO (1973), 33 D.L.R. (3d) 257 (Ont. C.A.)

The judgment of the Court was delivered by

SCHROEDER, J.A.:—This case is concerned with a perplexing problem of restrictive covenants said to run with certain land conveyed by a municipality to a resident and imposed partly by means of provisos set out in a transfer of the land made pursuant to the *Land Titles Act*, R.S.O. 1970, c.234, and partly by means of a resolution of the Municipal Council either already passed or to be passed at a future period, and which was, in fact, passed almost a month after the date of the conveyance as hereinafter set out.

The City of Toronto, which became the successor to the Corporation of the Village of Swansea when the village was amalgamated with it, appeals from an order pronounced by the Honourable Mr. Justice Houlden on August 3, 1972, whereby on a motion brought by the respondent pursuant to the provisions of Rule 610 of the Rules of Practice and Procedure the restrictive covenants expressed in the form of provisos in a transfer from the Village of Swansea to Joosep and Linda Oinas dated April 21, 1951, and registered in the Office of Land Titles for Toronto as instrument No. 515223 on April 24, 1952, were adjudged and declared to be invalid. The respondent cross-appeals from the learned Judge's refusal to order that the resolution in question, passed on May 21, 1951, and registered in the said Land Titles Office as instrument No. B-78949 be ordered, adjudged, and declared to be invalid.

The Council of the Village of Swansea enacted By-law 1340 on May 21, 1951, authorizing the sale of the lands involved in these proceedings. On the same date the same Council passed the following resolution:

CHAPTER ELEVEN: THE NATURE OF THE LEASEHOLD RELATIONSHIP

A) INTRODUCTORY NOTE

The first thing that it is necessary to understand about the nature of the landlord-tenant relationship, or the leasehold estate, is that it is an estate in land. While the relationship of landlord and tenant is created by contract, the relationship itself is not a contractual but a property relationship. In this sense it is the same as the relationship between a buyer and seller of land; they may contract to buy and sell, but once they have done so they are not in a continual contractual relationship that may be modified by negotiation or even breached. The buyer has an estate and can exclude the seller. Dealings between the two are at an end. So too in the classical conception of the leasehold estate. Once the tenant has the lease he or she has an estate and the absolute right to exclusive possession against all the world, including the landlord, for so long as the term of the lease provides. All the landlord has is the reversion - the right to retake possession and full rights when the tenant's estate is at an end.

The landlord-tenant relationship is thus a relationship created by contract, express or implied, in which a person with an interest in real property - the landlord or the lessor - grants a lesser interest in that property to the tenant or lessee. The technical term for lease is demise, and the leased land is often referred to as the "demised premises".

The remainder of this chapter expands on the point that a lease confers an estate in land, not merely certain contractual rights and obligations.

In the circumstances, I hold that the document was intended to and did in fact confer upon the appellant exclusive possession and exclusive control of the demised premises. Under this agreement the landlord had no right to possession and no right to control of the demised premises. Conversely, the appellant alone had these rights and with them all of the obligations and liabilities of a tenant. The document is a valid lease and the defendant has breached it as alleged.

Counsel contended that the document was ineffective because the lessor lacked the status to enter into such a contract. This issue was not raised at the trial. Having regard to all of the circumstances and the evidence, I am of the conclusion that the document was properly entered into by persons duly authorized to do so.

In the result, then, the appeal is allowed. The finding as to damages made by the learned trial Judge is not disputed in this appeal. Accordingly, the judgment below will be set aside and judgment will go for the plaintiff in the sum of \$2,043.75. The appellant should have its costs at the trial and in this Court.

Appeal allowed.

NOTE: In Street v. Mountford [1985] A.C. 809 (H.C.), Mr. Street rented a room to Mrs. Mountford pursuant to an agreement which gave her the right to exclusive possession. Throughout this agreement the word "licence" was used to refer to it: for example one clause stated that "an initial deposit equivalent to 2 weeks licence fee will be refunded on termination of the licence...". Mr. Street wanted to evade rent legislation which applied only to tenancies, and argued, in the words of Lord Templeman, for the following proposition of law: "an occupier granted exclusive possession for a term at a rent may nevertheless be a licensee if ... there is manifested the clear intentions of both parties that the rights granted are to be merely those of a personal right of occupation and not those of a tenant". The House of Lords rejected this argument, and largely ended a long-running controversy in English law in this area, by holding that exclusive possession for a term at a rent creates a tenancy in the absence of special circumstances. Such special circumstances would include, for example, accommodation that went with a job, such as caretaker's premises, but they could not include statements of apparent intention by the parties that their agreement be a licence: "the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent". In a now famous metaphor Lord Templeman stated: "The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade".

D) THE LAW RELATING TO ABANDONMENT AND SURRENDER OF LEASEHOLD ESTATES: FROM PROPERTY TO CONTRACT?

INTRODUCTORY NOTE: There are a variety of ways by which a leasehold relationship can be ended, one of which is known as "surrender". Using an old definition, this is "the yielding or delivering up of lands or tenements and the estate a man has therein, unto another that has a higher and greater estate". But what if the tenant wants to surrender half way through a one-year lease and the landlord does not? Apply to this problem what you have learned in contract law; you would tell the tenant that he or she is probably best to just get out and hope that the landlord, who has a duty to mitigate damages, will find somebody else to rent the premises at the same or a reduced rent. Your client would be liable for damages for breach, but they might not be that heavy, being only the difference between what you would have paid and what the landlord can get somebody else to pay. Conversely, you would probably advise the landlord that he or she cannot make you stay, that the best thing to do is to secure the premises and try to find another tenant knowing that you can sue the defaulting tenant for any shortfall.

But a lease is not a contract, it is an estate. If it is granted for twelve months it lasts for twelve months, unless surrendered, in which case it is absolutely at an end with no future obligations on either side. So, according to the classical analysis of the problem, as laid out in Goldhar below, you would have to tell the tenant something different. You would have to say that whether or not he or she physically abandons the premises the lease subsists for 12 months and he or she is liable for the whole term. The landlord has no duty to mitigate damages. But hopefully the landlord will do something foolish like re-enter and change the locks, in which case he or she will be considered to have accepted the surrender and you will have no liability left at all. So it's all or nothing for the tenant. Conversely, if advising the other side, you would caution the landlord that finding another tenant would be interpreted as a surrender and no rent could be got from the defaulting tenant. The landlord would therefore have to leave the premises unoccupied. Moreover, the landlord cannot sue for the whole of the term's rent when the tenant decamps after 6 months but must wait until it becomes due and is not paid (assume it's due monthly).

As noted, all of this is explained in Goldhar. Both that case and Highway Properties, which follows it, also show that there are some wrinkles in the traditional position and that factual considerations relating to such matters as whether, and if so when, the landlord accepted surrender can be very important. Think about why the traditional position reinforces the principal lesson of this chapter - that the lease is a property relationship - and about how you would answer the question contained in the second clause of the heading to this section.

Rent for May, 1982	\$2,000.00
Rent for June, 1982	2,000.00
Rent for July, 1982	2,900.00
Hydro charges	855.18
Tax escalation	<u>413.70</u>
TOTAL	\$8,168.88
less security deposit	<u>2,900.00</u>
AMOUNT DUE	<u>\$5,268.88</u>

The landlord further proved damages represented by the rent it would have received had the tenant performed its obligations under the lease. That amount is \$40,600 — \$2,900 per month for 14 months, August, 1982 to September, 1983 inclusive. The amount of rent received by the plaintiff during that time from periodic renting of the premises was \$4,800. The plaintiff is entitled to judgment for its damages between August, 1982 and September, 1983. However, pre-judgment interest is to run on each amount of \$2,900 only from the time that such amount was payable pursuant to the repudiated lease. From that total — \$40,600 plus interest — there is to be deducted the sum of \$4,800.

NOTE: A recent instructive case is Lehndorff Canadian Pension Properties Ltd. et al v. Davis Management Ltd. et al (1989), 59 D.L.R. (4th) 1 (B.C.C.A.). Lehndorff owned an office building in Vancouver and Davis leased several floors in the building. Davis decided to move out and assigned its leases to a third party. These leases contained the following covenant:

10.02 The Tenant covenants that it will not assign or sublet without leave, which leave the landlord covenants not to withhold unreasonably as to any assignee or sublessee who, in the Landlord's judgment, has a satisfactory financial condition, has a good reputation in the business community and agrees to use the Demised Premises for purposes satisfactory to the Landlord.

Lehndorff refused consent to the assignments, and Davis terminated the leases. Lehndorff sued for the remainder of the rent due under the leases, but lost. In the Court of Appeal Carrothers J.A., with whom Toy J.A. concurred, upheld the finding of the trial judge that the refusal to consent to the assignments was unreasonable. There remained the issue of whether this gave Davis the right to terminate or merely to sue for damages. Carrothers J.A. rejected a suggestion that the landlord's action had amounted to constructive eviction and stated:

Rather than construe the Burrard leases as demises of real property, I would prefer to construe them as commercial contracts. In *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.* (1971), 17 D.L.R. (3d) 710, [1971] S.C.R. 562, Laskin J. (as he then was), in stating some general considerations respecting the interpretation of leases, said this (at p. 721):

. It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

The somewhat unique factual situation of this case compels me to construe the Burrard leases, at time of termination thereof, as a commercial contract in accordance with the usual principles of contract law. Accordingly, I turn to the question whether the "Leave Required" provisions of s. 10.02 constituted a fundamental term of the Burrard leases so that breach thereof would amount to fundamental breach of contract.

An examination of the context persuaded the judge that a fundamental breach of contract had occurred when permission to sublet was refused. Therefore "DML would not be limited to a remedy in damages and would not be liable to Lehndorff for further rent".

CHAPTER TWELVE: LANDLORD'S OBLIGATIONS AT COMMON LAW

A) INTRODUCTORY NOTE

The rights and obligations of landlords and tenants are of three types: those implied by the common law, those that can be negotiated between the parties, and those imposed by statute. This chapter deals with the first category, looking at the obligations imposed on landlords by the common law. That is, they arise from the nature of the relationship itself, not from any agreement between the parties, even though they are often included in leases anyway. We will see that they are very limited in nature and scope.

B) THE COVENANT FOR QUIET ENJOYMENT

The covenant for quiet enjoyment supports the tenant's right to possess the whole of the land granted without a physical interference by the lessor. For example, if the lessor reserves the right to work minerals under the land and then causes a subsidence by doing so, the covenant for quiet enjoyment will be breached. For further elucidation of the principle, and for what is arguably an extension of it compared to its traditional scope, see the two following cases.

OWEN v. GADD, [1956] 2 W.L.R. 945 (C.A.)

LORD EVERSHERD M.R. This was an action for damages for breach of a covenant for quiet enjoyment. By a lease dated October 13, 1955, the lessors demised to the lessee the ground floor lock-up shop, situate at and known as No. 16 Eden Street, Kingston-upon-Thames, for a term of ten years at a rent of £700 per annum. The lessee entered into numerous covenants of the kind that one would expect in a lease of this character. The covenants included the following "and also will use and occupy the said shop for the retailing of baby carriages radio sets and radio accessories and toys and for no other purpose except with the consent in writing of the lessors." Among the lessors' covenants was a covenant for quiet enjoyment in, no doubt, very usual form; but, having regard to the argument, it is desirable that I should read it: "And that the lessee paying the rent

NOTES

1) Lord Denning referred to Kenny v. Preen in McCall v. Abelesz, [1976] 1 All E.R. 727 (C.A.) when he said that the covenant for quiet enjoyment "is not confined to direct physical interference from the landlord", and that "it extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant". Authority for this was given as Kenny.

2) In Franco v. Lechman (1962), 36 D.L.R. (2d) 357 (Alta. C.A.) premises were leased for use as a coffee, tobacco and candy shop. The building was sold before the lease expired, and the new landlord embarked on a course of action presumably intended to drive the tenant out. He refused the rent cheques, issued a notice to vacate based on non-payment of rent, created scenes in front of customers, and tried to prejudice the tenant's Italian customers against him. The tenant won at trial on a claim of breach of the covenant for quiet enjoyment, and the landlord appealed. Kane J.A. said at pp. 360-361:

Where the ordinary and lawful enjoyment of demised premises is substantially interfered with by acts of the lessor, the covenant is broken although neither title to nor possession of the premises may be otherwise affected....

The interference must be some physical interference with the enjoyment of the demised premises and a "mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough": Browne v. Flower, [1911] 1 Ch. 219 at p. 228.

In my opinion, there was a physical and substantial interference by the appellant with the enjoyment by the respondent of the demised premises for the purposes for which they were demised, that is operating a coffee counter and sale of confections and tobacco.

In arriving at this conclusion I do not consider that the giving of a notice to vacate in itself constituted a breach of the covenant. It is clear from the evidence of the respondent that he did not treat it as a valid notice and because of it vacate the premises. But the fact that the notice was given is evidence of the determination to endeavour to force the respondent to vacate and this, together with the other evidence accepted by the trial Judge, makes it plain that the appellant by his actions breached the covenant.

3) Malzy v. Eichholz, [1916] 2 K.B. 308 (C.A.), involved the lease by the defendant to the plaintiff of a restaurant property, being part of a block of shops and offices held by the defendant. The defendant then let an adjoining property to a third party, who used them in a way creating a public nuisance for the plaintiff restaurateur. The Court held that the fact that the lessor (defendant) had not participated in or authorized the nuisance created by the third party meant that he was not in breach of the covenant for quiet enjoyment:

there is no authority and no principle for holding a landlord liable under a covenant for quiet enjoyment - that is to say, that he has done anything which renders him liable to damages under the covenant in respect of quiet enjoyment - merely because he knows of what is being done and does not take any steps to prevent what is being done. There must be something much more than that.

C) THE COVENANT FOR NON-DEROGATION FROM GRANT

INTRODUCTORY NOTE: We have seen in other contexts that there is a general principle in real property law that the grantor not derogate from the grant. He or she may not give with one hand and take away with the other.

This principle applies to leaseholds also. In landlord-tenant law, a derogation from grant is said to occur when some act of the lessor, or those acting on his or her behalf, renders the land substantially less fit for the purpose for which it was let. Many of the things considered to be a breach of the covenant for quiet enjoyment will also be a breach of this covenant, but non-derogation goes further for it does not require a physical interference. See the following cases for further elucidation of the doctrine.

HARMER v. JUMBIL (NIGERIA) TIN AREAS LTD, [1921] 1 Ch. 200 (C.A.)

In 1911 the tenant for life of settled freehold estate in Cornwall granted a lease to the plaintiff of a small piece of land for twenty-one years at a rent of 7l. for the express purpose of an explosives magazine, and he entered into a covenant with the tenant for quiet enjoyment, but no other express covenant. The lessor knew that the purpose for which the grant was made would involve the imposition of some restrictions. The lessee was aware of the nature of the restrictions imposed by a licence for the magazine under the Explosives Act, 1875, and that if buildings were erected upon adjoining land of the lessor's within certain distances of the magazine the licence would be withdrawn. And both knew that there had been extensive working in the past of minerals in the immediate neighbourhood. In 1919 the defendants obtained a lease from the freeholder of the same estate of adjoining land for the purpose of working the minerals, but in such a manner as not to interfere with the explosives magazine of the plaintiff's or the rights of others, and, subject thereto, to erect buildings for the purpose of working the minerals. The defendants reopened two shafts and erected three buildings or sheds within distances prohibited by the plaintiff's licence under the Explosives Act.

The plaintiff sought an injunction and damages but lost at trial. The following extract from the appeal decision is taken from the judgment of Lord Sterndale M.R.

NOTES

1) The rule that it is not a derogation from grant for a landlord to permit competitive enterprises in neighbouring premises was confirmed in Clark's Gamble of Canada Ltd. v. Grant Park Plaza Ltd. (1967), 64 D.L.R. (2d) 570 (S.C.C.). Spence J. said at pp. 579-580:

In the present case, the landlord, whether it be considered to be Grant Park Plaza Ltd. or either of its subsidiary companies, does not propose to utilize any part of the balance of its land in a fashion which would result in any part of the lands leased to the appellant being rendered unfit for doing business. It proposes to erect a building more than twice the size of that leased to the appellant and lease the said building to the F.W. Woolworth company for the carrying on of a Woolco store. It is true that one could only expect the operation of the Woolco Store to be stern competition for the appellant. But this is far from conduct which would render the premises leased to the appellant unfit for it to carry on its business. To adopt the words from Browne v. Flower, supra, "After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort". Certainly the responsible officers of the appellant were well aware of the rights and interests of their employer. They had had long experience in both merchandising and leasing and would have found it a matter of no particular complication whatsoever to have drafted and insisted on a clear and exact covenant against leasing to a competing enterprise.

2) In Langley's Ltd. v. Lawrence Manor Investment Ltd., [1960] O.W.N. 436 (H.C.) a plan attached to the lease by the landlord showed a parking area attached to the shopping centre in which the tenant rented premises. The landlord later constructed a new building in the parking area, and this detrimentally affected the tenant's business. King J. held that the attachment of a plan to the lease was intended to confirm that this area would be available for parking. Hence the new construction did constitute a derogation from the property granted in the lease, and the plaintiff was entitled to damages.

NOTE: The distinction drawn by the common law between furnished and unfurnished premises was recently reaffirmed in Re Trella and Anko Investments Ltd. (1981), 122 D.L.R. (3d) 713 (Alta. Q.B.). Belzil J. stated that fitness for use must be covered by the terms of the lease in the case of unfurnished premises and that "a duty to repair defects that exist or which later arise will not normally be implied".

The next two cases involve common law rules in the Canadian context - or more precisely the Canadian winter! If there is no general common law implied covenant for fitness, how was the court able to imply a covenant for heat in Brymer?

BRYMER v. THOMPSON (1915), 23 D.L.R. 840 (Ont. S.C.)

MIDDLETON, J.:—Notwithstanding Mr. Bain's emphatic views, I think this case is simple, both upon the law and facts. The defendant owns the property known as 115 King street east. The property was in her husband's hands for management. As her attorney, he leased the basement and ground-floor to Mr. McArthur, and the lease contains a covenant on the part of McArthur to heat not only the floors leased but the remaining flats of the building. In consideration of this, the defendant agreed to pay for one-third of the fuel consumed. After the making of this lease, the defendant placed the leasing of the remaining floors in the hands of a real estate agent, who listed the properties as "steam-heated flats."

The only system of heating provided in the building was steam-heating; the steam for the entire building being generated in two boilers in the portion leased to McArthur. There were coils for heating purposes throughout the entire building, and the system provided was entirely adequate for the contemplated purpose.

The plaintiff leased the top-flat of the building from the agent as a steam-heated flat, and it was undoubtedly the intention of all parties that the demised premises should be heated by the landlord. Mr. Thompson prepared a written lease of the flat, but the lease makes no mention of heating. This lease was signed by the plaintiff. During the currency of the lease, Thompson, or McArthur for him, did supply steam-heat, but the steam supplied was inadequate. This arose not from any defect in the heating plant but from inefficient operation. The plaintiff required to use his premises from the hour of 8 a.m. Steam was not supplied from the boiler in sufficient volume to reach the top-flat, and afford any appreciable heating, until

CHAPTER THIRTEEN: TENANT OBLIGATIONS AND LANDLORD REMEDIES
IN COMMERCIAL TENANCIES

A) THE OBLIGATION TO PAY RENT

INTRODUCTORY NOTE: The payment of rent is one of two basic obligations imposed by the common law into the lease, the other being the tenant's duty to use the premises "in a tenant-like manner" discussed briefly in section (d) below.

At common law, once the lease has been executed the tenant was liable to pay and to continue to pay the rent due. As soon as the tenant did not do so, the landlord had an option. He or she could either enter and end the lease - called a forfeit of the lease - or distrain for rent, seize the tenant's goods in an action for distress. Sections 18 and 20 of the Landlord and Tenant Act, reproduced below, change the common law position on the right to forfeit to some small degree - how? Note also the provisions from the Criminal Code, which limit the landlord's ability to employ "self-help" remedies against a defaulting tenant.

Landlord and Tenant Act, R.S.O. 1990, c. L-7

18.—(1) Every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, shall be deemed to include an agreement that if the rent reserved, or any part thereof, remains unpaid for fifteen days after any of the days on which it ought to have been paid, although no formal demand thereof has been made, it is lawful for the landlord at any time thereafter to re-enter into and upon the demised premises or any part thereof in the name of the whole and to have again, repossess and enjoy the same as of the landlord's former estate.

20.—(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or application in the Ontario Court (General Division) brought by the lessee, apply to the court for relief, and the court may grant such relief as, having regard to the proceeding and conduct of the parties under section 19 and to all the other circumstances, the court thinks fit, and on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the court considers just. R.S.O. 1980, c. 232, s. 20 (1), *revised*.

In the present case, I find that the tenant has been, and still is, in breach of the covenants relating to repairs and alterations, the covenant not to assign or sublet without leave, and the covenant not to remove goods from the demised premises. In addition thereto the tenant was, at the date of re-entry by the landlords, in breach of the covenant to pay rent and to pay taxes. With respect to the payment of rent, he has persisted in late payment of same as referred to earlier, notwithstanding repeated requests for prompt payment. The matter of default in payment of taxes was brought to the tenant's attention long before the re-entry. The tenant chose to ignore the landlords' warning in that regard. In addition to all of the aforesaid matters, the tenant has moved his business from the demised premises to a new place of business on the same street. This is not a case of hardship where a tenant is, as a result of a careless oversight or other reason, being forced out of the business for which he rented the premises.

NOTE: In Earl Bathurst v. Fine, [1974] 2 All E.R. 1160 (C.A.) the court considered whether the personal attributes of the tenant should be taken into account in an application for relief. An English country house was leased to an American for 20 years. The lease contained certain stipulations, interpreted thus by Lord Denning:

These stipulations seem to me to show very clearly that the personal qualifications and suitability of Mr. Fine as a tenant were very much at the heart of this lease. It was fundamental that he would be there himself and that he would reside there himself and keep the house in a character fitting the estate.

The tenant departed for France for a time, and was then not permitted to re-enter England. His absence resulted in the operation of a clause of the lease which would forfeit the term. The tenant, admitting that he had no defence to the forfeiture, applied to the court for relief. Lord Denning said:

This case is unusual because it concerns the personal qualifications of the tenant. How far are those to be taken into account in granting or refusing relief from forfeiture? In many cases it would not be a ground for refusing relief, but in some cases it is. For instance, we have been referred to section 146 (9) of the Act of 1925 (a new section in 1925 which was not in the Conveyancing Act 1881) which shows that there are leases, such as leases of agricultural land, where the personal qualifications of the tenant are of importance. It says:

"This section does not apply to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest" in the case of five classes of lease, including "(e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property..."

That applies to forfeiture for bankruptcy or execution, but it seems to me that it is a legitimate consideration in other cases when relief is being considered. It applies in any case where the personal qualifications of the tenant are of importance for the preservation of the value or character of the property. This is essentially such a case. If the tenant is shown to be unsuitable personally, then relief can be refused. Here we have a man who is not a subject of this country but an American citizen. He has behaved in such a way that he is banned from entering this country and he is not a fit person to be a tenant of this property. The judge was quite right in refusing relief.

C) MORE ON REMEDIES FOLLOWING ABANDONMENT

INTRODUCTORY NOTE: The next two cases deal further with the issues of surrender and abandonment, considered in the Goldhar and Highway Properties cases in chapter eleven. You should review those cases at this point. An application of the principles in Highway Properties can be found in Commercial Credit Corp. Ltd. v. Harry O. Shields Ltd. (1980), 112 D.L.R. (3d) 153 (Ont. H.C.); affd. (1980), 112 D.L.R. (3d) 736 (Ont. C.A.). A commercial tenant in arrears of rent was placed in receivership. The landlord met with the receiver and was given the keys and a note disclaiming the lease. Being concerned about the security of the premises, the landlord took the keys, but continued to assert that the lease was still in force. This he confirmed by letter on the same day, which read:

Re: Ema Enterprises Limited Lease to Harry D. Shields Limited, 5701 Steeles Avenue West, Weston

We are the solicitors for Ema Enterprises Limited and note that you were appointed as receiver for Harry D. Shields Limited, the tenant under lease dated the 15th day of July, 1977 entered into between Ema Enterprises Limited and the said Harry D. Shields Limited.

Our client advises that Harry D. Shields Limited is in default of the payment of rent and has vacated the above-mentioned premises contrary to the terms of the lease.

Please be advised that our client proposes to relet the premises on the account of the tenant and enter into possession on that basis only.

Please also be advised that our client intends to hold the tenant responsible for any damages suffered and upon such reletting, all rentals received by our client from such reletting shall be applied, firstly, to the payment of any costs and expenses of such reletting, including brokerage fees and solicitors' fees and of the cost of any alterations and repairs that may be necessary; secondly, to the payment of any indebtedness other than rent due from you to our client; and thirdly, to the payment of rent due and unpaid, and the residue, if any, shall be held by our client and applied in payment of future rent as it may become due and payable.

Our client shall be looking to Harry D. Shields Limited for payment of the amount by which he rentals received from such reletting during any month are less than the rent payable during that month by the tenant, Harry D. Shields Limited.

Our client reserves the right that, notwithstanding any such reletting without termination, our client may at any time thereafter elect to terminate this lease.

A week after sending the letter the landlord executed a distress warrant and sold the tenant's goods for the arrears. At trial Holland J. held that the landlord had not accepted the surrender of the lease, so that lease remained in force. There being no forfeiture of the tenancy, therefore, the landlord had the right to take distress.

WINDMILL PLACE v. APECO OF CANADA LTD. (1976), 72 D.L.R. (3d) 539 (N.S.S.C. - A.D.)

An agreement to lease was made between the parties, but the prospective tenant never took possession. Since there was no landlord-tenant relationship, the breach by the "tenant" was merely contractual, giving a remedy in the damages, not rent. The issue was the amount of damages; specifically, to what extent should the landlord have to mitigate.

McKeigan C.J.N.S. gave the judgment of the court:

The facts relative to mitigation are simple. The appellant's building has about 62,500 sq. ft. of rentable space in a one-storey, U-shaped building. The front or bottom of the "U" is 332 ft. long and faces Windmill Rd. The arms of the "U" are 301 ft. and 276 ft. long respectively on their outer edges and are about 100 ft. deep. The building was designed as one large, open warehouse-type structure. The developer was prepared to lease to any prospective tenant any desired number of units of about 625 sq. ft. each and then would install any necessary fixtures, including partitions to wall of the tenant's choice. No particular part of the building was apparently any better than any other part, except that some tenants might favour the premises facing Windmill Rd. for their greater advertising value.

The respondent's space of 2,526 sq. ft. consisted of four units extending horizontally across and about halfway along the left arm of the "U".

The appellant had rented none of the rest of the building when the respondent repudiated its agreement. It later rented about 17,000 sq. ft. to Goodboys Furniture Ltd. effective February 1, 1976, four months after the repudiated lease to the respondent. The area thus rented, at a square-foot rental slightly less than that which was to have been paid by the respondent, consisted of the left-hand corner of the "U", being about 100 ft. on the bottom of the "U", the Windmill Rd. side, and extending 175 ft. up the full width of the left arm so as to include the space set aside for the respondent. Mr. Duckworth, the moving spirit in the Windmill Place project, testified that Goodboys had first wanted to go just back to the APECO space and to take some extra space along the front. He persuaded them to take the rear APECO space and forego the extra front area, which was to his advantage because he had feared that "I'd be sitting with that space forever . . . empty and half-finished".

the *Highway Properties* case at p. 572 S.C.R., p. 718 D.L.R., suggests a disposition of the courts "to imply that a re-letting was on the repudiating tenant's behalf, thus protecting the landlord's rights under the lease and at the same time mitigating the liability for unpaid rent". But the classification appears to be of importance only when applying the principle that a lease creates an estate in land with the technical consequences of abandonment and re-entry.

In my view, the *Highway Properties* case at p. 576 S.C.R., p. 721 D.L.R., specifically preserves for the parties to a commercial lease the "... full armoury of remedies ordinarily available to redress repudiation of covenants ..." and thus the measure of the appellant's damage is not limited by his election of remedy. The damages include the present value of unpaid future rent for the unexpired period of the lease and should be decreased by the actual rental value for the same period, whether or not there was a duty on the appellant to mitigate. In my opinion the *Highway Properties* case is the complete answer. It needs to be expanded only to the extent of giving the tenant the same access as was given to the landlord to the full range of contractual remedies and defences. Once it is established that the subsequent transaction — the new lease — arises out of the consequences of the breach in the ordinary course of business, the landlord's abandonment of a claim for prospective rent should not have the effect of limiting the common law defences based on the fact of mitigation whereby any loss has been successfully avoided.

In my view, when damages are calculated on the basis of breach of contract, the distinction between rent accrued and prospective rent, or damages for other breaches of covenant, are unimportant, the calculation being directed at placing the plaintiff in the same position as he would have been if all the covenants had been performed. The appellant in this case had been made whole.

I would dismiss the appeal with costs.

Appeal dismissed.

NOTE: In Grouse Mechanical Co. v. Griffith et al (1990), 14 R.P.R. (2d) 233 (B.C.S.C.) the tenant abandoned the premises and the landlord re-let, having given the new tenant an inducement of four months rent free. The landlord's damages claim included rent for those four months. Cowan J's judgment referred on more than one occasion to the landlord's "legal duty to mitigate" and he held that the no-rent inducement was a reasonable cost of performing that duty.

D) RESTRICTIONS ON USER

INTRODUCTORY NOTE: As noted above, the common law implied an obligation on the tenant to behave in a "tenant-like manner". Generally this means to maintain the integrity of the premises, although it does not go so far as impose a general obligation to repair. It means, for example, not to leave the premises unsupervised for a long period. There are a number of cases that say that in Canada the obligation to behave in a tenant-like manner includes doing whatever is necessary to prevent winter damage. That is, to inform the landlord of the day you are leaving, or to take precautions against freezing damage. Note that the parties may always agree on an express covenant to repair, and when this is done the implied covenant to act in a tenant-like manner is displaced. A general covenant to repair, which excepts fair wear and tear, is included in the sample lease in the Short Forms of Leases Act.

The obligation to behave in a tenant-like manner also effectively includes a statutory duty not to use the premises for certain illegal purposes. Section 18 (2) of the Landlord and Tenant Act provides:

Every such demise shall be deemed to included an agreement that if the tenant or any other person is convicted of keeping a disorderly house within the meaning of the *Criminal Code* (Canada) on the demised premises or any part thereof, or carries on or engages in, on the demised premises or any part thereof, any trade, calling, business or occupation for which a licence is required under a by-law passed under section 224 or 225 of the *Municipal Act* without that licence, it is lawful for the landlord at any time thereafter to re-enter into the demised premises or any part thereof and to have again, repossess and enjoy the same as of the landlord's former estate. R.S.O. 1980, c. 232, s. 18, *revised*.

There are two other ways in which the tenant's uses of the premises may be restricted in particular cases. First, there is a duty not to put the premises to a use or employment materially different from that for which they are granted or usually employed. For this see McQuaig v. Lalonde below. Second, many leases have specific covenants that deal with types of user. The operation of such an express covenant is illustrated by the Koumoudouros case.

CHAPTER 14: INTRODUCTION TO RESIDENTIAL TENANCIES

A) GENERAL

INTRODUCTORY NOTE: All Canadian jurisdictions now have separate statutory regimes for residential tenancies. That of Ontario is found in Part IV of the Landlord and Tenant Act. Read the following extracts and then carefully examine the statutory provisions reproduced to see how the Act puts into practice the principal aspects of the reforms noted. Note that I have not included in this chapter the provisions which permit termination of residential tenancies; they are to be found in chapter 16.

R.J. Balfour, Landlord and Tenant Law

Since 1970, legislation enacted in the common law provinces has fundamentally changed the law of residential tenancies. The nature and significance of these changes are considered throughout this book and particularly in Section 4D, which deals with the obligations of landlords and tenants with respect to the condition of and repair to rented premises, and Section 5C, which deals with termination of tenancies for cause. At this point, however, it is important to understand in general terms the nature of the legal regime applicable to residential tenancies and to begin to consider the related policy questions, including the rationale for the changes and their adequacy.

The details of the applicable regimes vary from province to province in both significant and insignificant ways. In general, they have altered the common and statutory law applicable to residential tenancies in three basic ways:

1. They have imposed new substantive obligations on landlords, including shifting to them obligations that the common law imposed on tenants. Of these new landlords' obligations, by far the most important is the obligation to repair residential premises and to keep them in habitable condition.

2. They have substantially enhanced the entitlement of residential tenants to remain in possession of their premises, by limiting the landlord's traditional rights of termination. Residential tenancies may not be terminated prior to their expiration by breach of the tenant of his or her lease unless the breach is one of the limited causes specified by statute as justifying the termination; in general, only behaviour of the tenant that is fundamentally inconsistent with his or her obligations or legitimate interests of the landlord to retake possession provides justification. Notice provisions—which often vary with the term of the tenancy and the grounds for termination—are similarly protective of the residential tenant. Four provinces—Ontario, Manitoba, Prince Edward Island and (in respect of tenancies that have continued for five years) Nova Scotia—have gone still further to create for tenants what is generally described as “security of tenure” or, more precisely, the right to remain in possession as long as desired except in the event of termination for the limited causes specified in the legislation. Residential leases may not be terminated by the landlord giving notice or even by the expiration of the term of the lease. Breach of a lease is only grounds for termination if it also constitutes a statutory cause and leases that would otherwise terminate on the giving of notice or the expiration of the term are automatically extended indefinitely until terminated consistently with the legislation.

- (e) a reason for the application being brought is that the premises are occupied by children, provided that the occupation by the children does not constitute overcrowding and the premises are suitable for children. R.S.O. 1980, c. 232, s. 121 (1-3).
- (4) A landlord shall not,
 - (a) withhold reasonable supply of any vital service, such as heat, fuel, electricity, gas, water, food or other vital service, that it is the landlord's obligation to supply under the tenancy agreement or deliberately interfere with the supply of any such vital service whether or not it is the landlord's obligation to supply such service during the tenant's occupation of the premises and until the date on which a writ of possession is executed; or
 - (b) substantially interfere with the reasonable enjoyment of the premises for all usual purposes by a tenant or members of his or her household with intent to cause the tenant to give up possession of the premises or to refrain from asserting any of the rights provided by this Act or provided by

the tenancy agreement. R.S.O. 1980, c. 232, s. 121 (4); 1987, c. 23, s. 7.

122.—(1) Any person who knowingly contravenes section 82, 83, 84, 91, 92, 93, 111, 121, 125, 126 or 127 is guilty of an offence and on conviction is liable to a fine not exceeding \$5,000. R.S.O. 1980, c. 232, s. 122 (1); 1989, c. 72, s. 18, *part*.

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is \$25,000 and not as provided in subsection (1). 1989, c. 72, s. 12.

(3) Where a landlord is convicted of the offence of contravening section 82 or 83, the justice under the *Provincial Offences Act* making the conviction may order the landlord to pay to the tenant the security deposit or any part thereof that is unpaid. R.S.O. 1980, c. 232, s. 122 (2).

NOTE: The above extracts from the Act are taken from R.S.O. 1990, in force as of 31 December 1991. The section numbers in the current Act are different to those used in this chapter and the cases in succeeding chapters. The following list will enable you to match up the old and new section numbers.

<u>Old Number</u>	<u>RSO 1990</u>
82	80
89	87
96	94
105	103
106	104
107	105
108	106
109	107

B) INTERPRETING PART IV

In Re Boyd and Earl and Jennie Lohn Ltd. (1984), 7 O.R. (2d) 111 (H.C.) the landlord required the tenant, a female student, to sign a one-year lease, to pay for the first and last months' rent, and to pay for the remaining 10 months in 8 pro-rated monthly instalments. Potts J. declared the lease void on the grounds that s.84 (now s.82) prohibited security deposits except for the last months' rent. The pro-rated payments were a security deposit because s.81 (now s.79) defined that term to include any deposit for the performance of any obligation of the tenant.

190 LEES AVENUE LIMITED PARTNERSHIP v. DEW ET AL (1991), 16 R.P.R. (2d) 79 (Ont. G.D.)

March 13, 1991. CHADWICK J.: - The plaintiff corporation brings an action against the defendants Ms Dew, Ms Tanguay and Mr. Whissell for damages arising out of the alleged breach of a residential tenancy agreement dated January 13, 1988.

Before hearing the merits, a preliminary issue was raised by counsel for the defendants. Counsel questioned whether a landlord who has served a notice to terminate a residential tenancy under the provisions of the *Landlord and Tenant Act*, R.S.O. 1980, c. 232, and the tenant has vacated, can still sue for prospective loss of rent at common law.

I heard argument from both counsel respecting this question and have read the authorities provided to me.

Application of the Landlord and Tenant Act

Part IV of the *Landlord and Tenant Act* applies to all residential tenancies. Section 82 of that part states that its provisions prevail over the other parts of the Act and cannot be waived unless the Act so states.

The Act sets out in s. 89 that:

"Subject to this Part, the common law rules respecting the effect of the breach of a material covenant by one party to a contract on the obligation to perform by the other party apply to tenancy agreements."

have had an opportunity to make representations thereon. In my view, neither of those prerequisites was present. I am, therefore, of the opinion that this appeal should be allowed only to the extent that it should be referred back to the County Court of the Judicial District of York so that the proper amount of the abatement of rent may be determined upon a reference unless the parties are able to arrive at a reasonable settlement. In view of this disposition it is unnecessary to deal with the respondents' alternative request for leave to amend the notice of appointment.

I realize that His Honour Judge MacRae has died since he gave his decision in this matter but I am of the opinion that the person designated by s. 96(3) of the *Landlord and Tenant Act* is "... a judge of the county or district court of the county or district in which the premises are situate . . ." and that, therefore, another member of that Court may proceed with the reference.

I would not disturb the order of the County Court Judge nor of the Divisional Court as to costs. The Court of Appeal in dismissing the appeal allowed to the respondents their costs of the appeal. The order of this Court granting leave to appeal was on condition that the costs of the appeal to this Court be borne by the applicant, in any event of the appeal. In view of the divided success here, and of that condition, I would direct that there be no costs in the Court of Appeal, but, that the appellant do pay the respondents' costs of the appeal to this Court, including, of course, the application for leave.

Appeal allowed in part.

NOTES

1) In Tucker et al v. Scott (1980), 22 R.P.R. 255 (Ont. Co. Ct.) Borins J. held that a tenant was not justified in withholding rent because of an alleged breach of s.94. Application to the court for an abatement should be made.

CHAPTER SIXTEEN: TERMINATION OF RESIDENTIAL TENANCIES

A) INTRODUCTION

NOTE: Given that tenants generally have security of tenure, special provisions are required if landlords are to be able to terminate tenancies. Essentially the ways in which this can be done are of two kinds - termination because of a landlord's legitimate needs, and termination because of tenant fault. Review the provisions of the legislation reproduced below with this in mind.

Landlord and Tenant Act, Part IV

TERMINATION OF TENANCIES

96.—(1) Except as expressly otherwise provided in this Act, no tenancy of residential premises whether weekly, monthly, year to year or for any term certain, shall be terminated except upon notice by the landlord or the tenant given to the other in accordance with the provisions of this Part.

• • • •

103.—(1) Despite section 98, 99, 100, 101 or 102, where a landlord in good faith requires possession of residential premises at the end of,

(a) the period of the tenancy; or

(b) the term of a tenancy for a fixed term, for the purpose of occupation by himself or herself, his or her spouse or a child or parent of the landlord or the landlord's spouse, the period of the notice of termination required to be given is not less than sixty days. R.S.O. 1980, c. 232, s. 105.

(2) Where a notice of termination given under subsection (1) is contested and the landlord requires possession of residential premises for a spouse or for a child or parent of a spouse, and the landlord is not married to the spouse, the landlord and the spouse shall file with the court a joint declaration of spousal status. 1986, c. 64, s. 24 (3).

105.—(1) Despite section 98, 99, 100, 101, 102 or 103, where a landlord requires possession of residential premises for the purposes of,

- (a) demolition;
- (b) conversion to use for a purpose other than rental residential premises; or
- (c) repairs or renovations so extensive as to require a building permit and vacant possession of the premises,

the landlord may, at any time during the currency of the tenancy agreement, give notice of termination of the tenancy agreement, provided that the date of termination specified shall not be sooner than.

(d) 120 days after the date the notice is given; and

(e) the end of the tenancy agreement.

(2) Where a tenant receives notice of termination under subsection (1), the tenant may at any time prior to the date specified in the notice terminate the tenancy agreement by,

- (a) giving the landlord not less than ten days notice of termination specifying an earlier date of termination of the tenancy; and

NOTES

1) In Re Metropolitan Toronto Housing Authority and Pennant (1991), 81 D.L.R. (4th) 404 (Ont. G.D.) Karen Pennant's apartment was searched by police and a loaded, restricted and stolen firearm discovered. In considering the application for a termination of the tenancy under s.109 (1) (b) (now s.107) Corbett J. accepted Pennant's argument that the search warrant was invalid, but refused to exclude the evidence from the proceedings. He then found as a fact, on the civil standard, that Pennant had "permitted the unlawful act of possession of a prohibited weapon". However, he refused to grant the application for termination, stating at p. 412:

The tenant resides at the premises with her four-year-old son. She has no criminal record and there has been no previous difficulties with this tenant during her two-year tenancy. In these circumstances and since the overall case for the landlord was not compelling, I will not grant the writ of possession. For these reasons, the application will be dismissed upon condition that no hand-guns or firearms be permitted in, on, or at the subject premises at any time.

2) In Metropolitan Toronto Housing Authority v. Smith the MTHA sought to terminate the 10-year tenancy of Merleaner Smith, an unemployed single mother then attending school to upgrade her education to a grade 10 level. The reason for the application was that Smith's 24-year old son, Anthony Aransibia, who lived with her and her two other minor children, was trafficking in cocaine in the parking lots and roadways of the Lawrence Heights Project. At the time of the application he was awaiting trial. There was no suggestion that Ms. Smith was in any way involved in the trafficking and she could not ask her son to leave because one of the conditions of his bail was that he not move. In an unreported judgment the trial judge allowed the application and held that:

- (a) Aransibia had committed an illegal act.
- (b) the illegal act had been committed on the residential premises, which involved common areas of the complex.
- (c) Ms. Smith had "permitted" this act; she knew of it and was wilfully blind to it.

The tenant appealed to Divisional Court, which upheld the termination [(1989), 33 O.A.C. 349]. It rejected an argument that, where the landlord was relying on illegal acts carried on

by a third party, an actual conviction should be required before the tenant could be evicted. It also briefly rejected an argument that, in these circumstances, termination of the tenancy represented a breach of Smith's s.7 right to security of the person. Moreover, even if it did constitute a violation, the court held that it was done consistently with the principles of fundamental justice.

